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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH GODOY, aka
RICHARD G. WOOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the forfeiture provisions of RICO (18 U.S.C. § 1963) reach the distributed income and profits of a convicted racketeer?

2. Is an indictment returned by fewer than twelve fully informed grand jurers void?

TOPICAL INDEX

Jurisdiction 2
Opinion Below 2
Questions Presented For Review 3
Constitutional Provision Involved 3
Statutory Provisions Involved 3
Statement Of The Case 6

Argument

I.

Rico

Do The Forfeiture Provisions Of RICO (18 U.S.C. § 1963) Reach The Distributed Income And Profits Of A Convicted Racketeer? 8

II.

Grand Jury Issue

Is An Indictment Returned By Fewer Than Twelve Fully Informed Grand Jurors Void? 13

Conclusion 15
Appendix A 17
Appendix B 30

TABLE OF AUTHORITIES CITED

Cases Page

In Re Murchison 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1954) 15

International Shoe Co. v. Washington 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945) 14

Wood v. Georgia 370 U.S. 375, 82 S. Ct. 1364, 8 L.Ed. 2d 569 (1962) 14

United States v. Godoy 678 F.2d 84 (9th Cir. 1982) 2, 7, 8, 9, 10

United States v. Leverage Funding Systems, Inc. 637 F.2d 645 (9th Cir. 1980) 13

United States v. Long 654 F.2d 911 (3rd Cir. 1981) 11

United States v. Martino 681 F.2d 952 (5th Cir. 1982) 10, 11

United States v. Marubeni America Corp. 611 F.2d 763 (9th Cir. 1980) 7, 8, 9, 10, 11, 12

United States ex. rel. McCann v. Thompson 144 F.2d 604 (2nd Cir. 1944) ..... 1?

United States v. Leverage Funding Systems, Inc. 478 F. Supp. 799 (C.D. Cal. 1979) 13, 14

Statutes

18 U.S.C. § § 1962, 1963 (RICO) 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13

21 U.S.C. § 841(a)(1) 1, 6

21 U.S.C. § 848(a)(2) 11, 12

28 U.S.C. § 1254(1) 2

Rules

Revised Rules of the United States Supreme Court, as Amended 12/31/81, Rule 20.1/.4 2

Federal Rules of Criminal Procedure, Rule 6 ..... 5, 13, 15

Constitutions

Constitution of the United States, Fifth Amendment 3

Law Reviews

Taylor, "Forfeiture Under 18 U.S.C. § 1963 — RICO's Most Powerful Weapon," 17 Am. Crim. Law Rev. § 739, Winter 1980 ..... 12, 13

"White-Collar Crime: Second Annual Survey of Law," 19 Am. Crim. Law Rev. 351, Fall 1981 12

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 24, 1982, rehearing denied July 28, 1982, affirming Petitioner's convictions for racketeering (RICO, 18 U.S.C. § 1962 *et seq.*) and controlled substance offenses (21 U.S.C. § 841(a)(1)), and affirming the forfeiture of two parcels of land pursuant to 18 U.S.C. § 1963 (RICO).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner's petition for rehearing having been denied on July 28, 1982 (see Appendix B), this petition is timely filed within 60 days thereafter (Rule 20.1/.4, Revised Rules of the United States Supreme Court, as amended December 31, 1981).

OPINION BELOW

Petitioner was found guilty by a jury in the United States District Court, Central District of California, and sentenced to a total of twelve years in the penitentiary plus a two year special parole term. The jury also found that six pieces of property were subject to forfeiture, and the District Court ordered four of the six parcels forfeited to the United States.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit arguing 1) that his indictment was void and 2) that two pieces of property were not properly subject to forfeiture under 18 U.S.C. § 1963. The government cross-appealed (following the denial of a Rule 35, F.R.CR.P., Motion).

Petitioner's conviction and all of the forfeitures were affirmed by a divided court in an opinion published at 678 F.2d 84 (1982), a true copy of which appears herein as Appendix A. A petition for rehearing and suggestion for rehearing en banc was timely filed and denied on July 28, 1982.

Petitioner is presently incarcerated at the Federal Correctional Facility at Terminal Island, California.

QUESTIONS PRESENTED FOR REVIEW

1. Do the forfeiture provisions of RICO (18 U.S.C. § 1963) reach the distributed income and profits of a convicted racketeer?

2. Is an indictment returned by fewer than twelve fully informed grand jurers void?

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . .; nor [shall any person] be deprived of life, liberty, or property without due process of law."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any

pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or

prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Rule 6, Federal Rules of Criminal Procedure:

(1) The Grand Jury.

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to Grand Jury and to Grand Jurors.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

STATEMENT OF THE CASE

RICO

Petitioner was convicted by a jury of eight counts of distributing or possessing with the intent to distribute methaqualone, a schedule II, controlled substance (21 U.S.C. § 841(a)(1)), and five counts of racketeering in violation of 18 U.S.C. § 1962 (the "Racketeer Influenced and Corrupt Organizations" Act, commonly and hereinafter referred to as "RICO"). The jury also returned special verdicts declaring that Petitioner's interests in six particularly described properties were subject to forfeiture under the RICO forfeiture provisions (18 U.S.C. § 1963).

Sentence was imposed by the Honorable William P. Gray as follows: Petitioner was to serve a total of twelve years in the penitentiary, to be followed by a special parole term of two years. The court also ordered the forfeiture of four property interests possessed by Petitioner, to wit: (1) commercial property in Van Nuys, California; (2) commercial property in Mission Hills, California; (3) the "Whiskey Creek" nightclub; (4) residential (rental) property in Northridge, California. The court declined to order the forfeiture of two additional property interests, to wit: (5) "Ralph Brother's Market and Pharmacy" in South Central Los Angeles, California; (6) a parcel of land in Ventura County, California.

Respondent has heretofore conceeded that the residential property (No. 4 above) and the Ventura County parcel (No. 6 above) are not properly subject to forfeiture. (see 678 F.2d at 86). Petitioner has heretofore conceeded that the "Whiskey Creek" nightclub (No. 3 above) is properly subject to forfeiture (*Id.*) and herein will conceed that his interest in the "Ralph Brothers' Market and Pharmacy" (No. 5 above) is subject to forfeiture as an "interest he . . . maintained in violation of Section 1962 . . ." (18 U.S.C. § 1963(a)(1)). Thus the issue presented to this court involves only two parcels of commercial property (Nos. 1 and 2 above) which Petitioner owned but did not operate (see *infra*).

The Ninth Circuit held that Petitioner's investment of racketeering income in these passive real estate ventures constituted an "enterprise" for RICO purposes, thus subjecting them to forfeiture. The dissenting justice (and Petitioner) believe that this holding is contrary to the law and that it makes a nullity of the Ninth Circuit's leading opinion of the subject, *U.S. v. Marubeni America Corp.*, 611 F.2d 763 (1980), wherein it was held that income and profits from a RICO enterprise, once distributed and

severed from the corrupted "enterprise," were not subject to forfeiture under Section 1963. The majority in the instant matter distinguished *Marubeni* by stating that there the income had not been reinvested (i.e., was still in a bank account) while Petitioner had reinvested his income and thus acquired an "interest in an enterprise" subject to forfeiture. Judge Poole, in dissent, saw this as a distinction without meaning (678 F.2d at 88-89).

GRAND JURY

The superseding indictment in this case, upon which Petitioner was tried, was returned on October 3, 1979. Present on that day were seventeen members of the grand jury. While at least twelve of the jurors voted to indict Petitioner, only ten of the jurors present on that day had attended all of the sessions at which evidence concerning this matter had been presented; three had missed one evidentiary session and four had missed two sessions. Three of those seven jurors had missed the session on August 22, 1979, during which the case against Petitioner was summarized and the original indictment returned.

Thus, of the grand jurors voting for the superseding indictment of Petitioner, at least two of the necessary votes were cast in partial ignorance of the complete facts!

ARGUMENT

I.

RICO

DO THE FORFEITURE PROVISIONS OF RICO (18 U.S.C. § 1963) REACH THE DISTRIBUTED INCOME AND PROFITS OF A CONVICTED RACKETEER?

Given the Department of Justice's ever-increasing use of RICO, whether or not the distributed income and profits of a "racketeering enterprise" are subject to

forfeiture under 18 U.S.C. § 1963 is a federal question of the utmost importance and upon which the lower courts are in disagreement. Only a decision by this Honorable Court will provide for uniformity of decisions.

The two properties at issue herein are commercial properties located in the Los Angeles suburbs. As described by the majority opinion of the Ninth Circuit, "The Van Nuys property includes a building leased to two different businesses: One a camera shop, the other a pharmacy. The Mission Hills property is a corner lot and building leased to six different businesses, including a liquor store, a television repair shop and a small market." (678 F.2d at 86) The dissenting opinion of Judge Poole goes on to state, correctly, that ". . .[T]he majority does not suggest that those tenants are involved with Godoy in a RICO 'enterprise' since Godoy was not associated with them in any way. Nor does the opinion imply that Godoy's property interests afforded him a 'source of influence over' the tenant businesses. (See 18 U.S.C. § 1963(a)(1)) It is quite clear that Godoy had no relationship with any of the businesses conducted on his properties other than that of landlord. . ." *Id.* at 88-89.

As Judge Poole pointed out, the assertion by the majority that the reinvestment of racketeering income in a passive investment constitutes an "enterprise" for RICO purposes "effectively nullifies" the Ninth Circuit's controlling precedent, *U.S. v. Marubeni*, 611 F.2d 763. (*Id.* at 89), which held

> [T]he § 1963(a)(1) forfeiture provision applies to interests "in an enterprise" illegally acquired or maintained. Section 1963(a)(2) completes the attack on racketeering infiltration by insuring that persons who conduct an enterprise illegally will similarly be separated from it, even if the enterprise was legally acquired and maintained. (611 F.2d at 769)

Whether the Ninth Circuit has, in this case, "nullified," "nullified sub silento," or "finessed" the clear holding of its own *Marubeni* decision, it is apparent that the Ninth Circuit does not have a clear or workable rule concerning the reach of § 1963 as it applies to the distributed income of a racketeering enterprise. Making the scope and reach of this important and controversial statute depend on the status of that income (i.e., cash vs. property) is unrealistic, unwise and untenable.

The other circuits which have addressed this question have not had much more success.

The Fifth Circuit struggled with the issue in *U.S. v. Martino*, 681 F.2d 952 (1982). In that case the issue was "the forfeitability of insurance proceeds obtained through the conduct of an arson ring." (*Id.* at 953) The district court resolved the issue in favor of the government, but on appeal the panel hearing the matter reversed that finding relying on the Ninth Circuit ruling in *Marubeni, supra.* (see *Id.* at 963, dissent of Judge Politz). The Fifth Circuit then, sua sponte, ordered a rehearing *en banc* of the issue and the majority of the judges in that circuit reversed the panel decision and held that "§ 1963(a)(1) encompasses forfeiture of the income or proceeds of racketeering activity." (*Id.* at 961)

In reaching this conclusion the *en banc* majority forthrightly noted both their conflict with the Ninth Circuit *and* the conflict within the Ninth Circuit as reflected in the instant matter:

> Our holding today squarely conflicts with that of the Ninth Circuit in *U.S. v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980). But see *U.S. v. Godoy*, 678 F.2d 84 (9th Cir. 1982) (holding that commercial real estate purchased with profits derived from racketeering activity is subject to forfeiture.) (*Id.* at 959)

Seven judges of the Fifth Circuit dissented from the *en banc* decision (681 F.2d at 962). They adhered to the position that "the forfeiture in RICO extends only to interest in an enterprise and does not include income or proceeds from a pattern of racketeering activity" (*Id.* at 903) as held in *Marubeni*.

No other circuit court has squarely addressed the issue. In dictum, however, the Third Circuit agreed with the *Marubeni* rule, to wit:

> The government argued at the hearing below that the criminal forfeiture provisions of [21 U.S.C.] 848(a)(2) are identical in scope and purpose to those of the RICO statute . . . compare 18 U.S.C. § 1963(a) with 21 U.S.C. § 848(a)(2). While these forfeiture provisions are similar, they are by no means equal in scope; the *in personam* forfeiture of C.C.E. [continuing criminal enterprise] covers all the profits earned from any continuing criminal enterprises. *RICO, conversely, requires the defendant to forfeit only his personal interest in the tainted enterprise.*

U.S. v. Long, 654 F.2d 911, 915 fn. 6 (3rd Cir. 1981) (citations omitted, emphasis added).

The result reached by the Ninth Circuit in *Marubeni*, the Third Circuit in *Long*, and the dissenters in *Martino*, is in accord with the conclusions reached by most, if not all, legal scholars and commentators. Many of them, in part, predicate their conclusions, as did the courts noted, on the fact that the forfeiture provisions of 21 U.S.C. § 848(a)(2) and RICO were passed by the same congress in the same month.

> We note that Congress specifically provided for forfeiture of "profits" retained from a criminal

> enterprise in the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. § 848(a)(2)(A). The Drug Abuse Act was passed by the same Congress in the same month as RICO. Had Congress intended forfeiture of racketeering income, we believe it would have expressly so provided.

(*Marubeni, supra*, 611 F.2d at 766, fn. 7)

As interpreted by one commentator, "RICO's most innovative provision, criminal forfeiture, was designed to . . . provide . . . a means of separating the convicted racketeer from the 'enterprise' which has been corrupted." (Taylor, "Forfeiture under 18 U.S.C. § 1963 - RICO's Most Powerful Weapon," 17 AM. Crim. Law Rev. 379, Winter 1980). More broadly stated:

> Generally, Section 1963 subjects to forfeiture any "interest" in an enterprise whose affairs are conducted in violation of Section 1962. A forfeitable "interest" includes a continuing proprietary right, such as a partnership or stock ownership, and any elected office affording influence over the enterprise. Conversely, the "fruits or profits", including income, dividends, and distributed profits derived from the operation of such an enterprise are not within the government's reach under Section 1963. Assets subject to forfeiture generally include only those invested in the illegal activities of the enterprise.

("White-Collar Crime: Second Annual Survey of Law," 19 Am. Crim. Law Rev. 351, 364, Fall 1981)

It is clear that the properties at issue in this case fall within the term "profits"; they were not a part of a corrupt organization or racketeering enterprise. They were simply

the repository of choice for income, just as a bank account, stock certificate or pillow case could serve as a repository for income.

The final "clear" point at issue here is that the lower courts and the legal commentators are in fundamental disagreement over whether or not 18 U.S.C. § 1963 allows for, or even directs, the forfeiture of such "profits" as opposed to being limited to "separating the convicted racketeer from the 'enterprise' which has been corrupted." (*Taylor, supra*) Only a decision by this Honorable Court can resolve the issue and provide for the uniform application of the law throughout the country.

II.

GRAND JURY ISSUE

IS AN INDICTMENT RETURNED BY FEWER THAN TWELVE FULLY INFORMED GRAND JURORS VOID?

The two circuits that have addressed this question have both responded in the negative. *U.S. ex rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir. 1944), *Cert. Denied* U.S. 790, 65 S.Ct. 313, 89 C. Ed. 630 (1944) and *U.S. v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir. 1980), reversing 478 F. Supp. 799 (C.D. Cal. 1979), *Cert. Denied* 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed. 2d 972 (1980). Adopting the reasoning of the Second Circuit the rule in the Ninth Circuit is that

> under the Fifth Amendment and Fed. R. Crim. P.6(a) and 6(f), an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing requires that every juror voting to indict attend every session. (637 F.2d at 649)

Citing the paragraph above, the Ninth Circuit denied Petitioner's prayer for a reversal of his conviction and dismissal of his indictment on the grounds that at least two of the jurors voting to indict him did so in at least partial ignorance of the facts.

Judge Nelson of the Ninth Circuit dissented from the decision in *Leverage Funding* (637 F.2d at 649) and would have adopted the opinion of then District (now Circuit) Judge Pregerson, reported at 478 F. Supp. 799 (C.D. Cal. 1979), dismissing the indictment. In order to set forth a rule of constitutional law which vindicates the fundamental right to have an *informed* grand jury stand between an accused and his accusor, Petitioner prays that this court issue its Writ of Certiorari and adopt as its own the same reasoning.

In *Leverage Funding* the records demonstrated that only nine of the nineteen grand jurors voting to indict the Defendants had attended all of the sessions at which evidence was presented; ten of the jurors voting to indict had missed one or more sessions.

In *Wood v. Georgia*, 370 U.S. 375, 82 S. Ct. 1364, 8 L.Ed. 2d 569 (1962), Chief Justice Warren described the grand jury as that constitutional body primarily responsible for protecting "the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused. . ." (370 U.S. at 380) In the same context Chief Justice Warren spoke of "[t]he necessity to society of an independent *and informed* grand jury. . ." (*Id.*, emphasis added.)

Fundamental "notions of fair play and substantial justice," long a benchmark of due process in other contexts (see *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95, 102

(1945)), would seem to dictate that the vote of a grand juror be counted only when he is informed of all the evidence presented. As certainly as the vote of a petit juror who missed a session would be meaningless and void, the uninformed vote of a constitutionally-mandated grand juror should be considered void as well.

Asserting that "to perform its high function in the best way 'justice must satisfy the appearance of justice' " (*in Re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1954)), Petitioner urges this court to declare as a matter of due process, as guaranteed by the Fifth Amendment, and in order to vindicate the notions underlying Fed. R. Crim. 6(a) and 6(f), that an indictment returned by fewer than twelve *informed* grand jurors is void.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the United States Court of Appeals for the Ninth Circuit entered herein.

Dated: September 25, 1982

Respectfully submitted,

JOSHUA C. NEEDLE
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ralph GODOY, aka Richard G. Wood,
Defendant-Appellant.

Nos. 79-1788, 80-1600.

United States Court of Appeals,
Ninth Circuit.

Argued Sept. 19, 1980 and
March 24, 1981.

Submitted March 24, 1981.

Decided May 24, 1982.

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Defendant was convicted in the United States District Court for the Central District of California, William P. Gray, J., under Racketeer Influenced and Corrupt Organizations Act and for possession and sale of methaqualone, and he appealed his conviction and the District Court's order forfeiting certain properties. The Government challenged the district court's denial of its motion to correct the forfeiture order. The appeals were consolidated. The Court of Appeals, Nelson, Circuit Judge, held that: (1) fact that only ten of 17 grand jurors voting indictment had attended evidentiary sessions did not render indictment void; (2) defendant's ownership of commercial real estate constituted "interest in any enterprise," under forfeiture provisions of RICO; (3) Court of Appeals had jurisdiction to review district court's denial of Government's motion to correct forfeiture order as an illegal sentence; and (4) district court's forfeiture order was an illegal sentence because it did not include market property.

Affirmed in part, reversed in part and remanded.

Poole, Circuit Judge, concurred and dissented and filed an opinion.

Appeal from the United States District Court for the Central District of California.

Before POOLE, NELSON and NORRIS, Circuit Judges.

NELSON, Circuit Judge:

Ralph Godoy appeals his convictions under 18 U.S.C. § 1962 (1976) (RICO) and 21 U.S.C. § 841(a)(1) (1976) (possession and sale of methaqualone). He also appeals the district court's order forfeiting certain properties pursuant to 18 U.S.C. § 1963 (1976). The Government challenges the district court's denial of its motion to correct the forfeiture order, made pursuant to Fed.R.Crim. P. 35. This court ordered consolidation of the two appeals.

Godoy was indicted by a federal grand jury on October 3, 1979. The indictment sought forfeiture of six parcels of California real estate under RICO: (1) the Ralph Brothers Market and Pharmacy, (2) an unimproved lot in Ventura County, (3) commercial property in Van Nuys, (4) commercial property in Mission Hills, (5) the Whiskey Creek Nightclub, and (6) residential property in Los Angeles. Shortly after arraignment, the district court issued an order restraining disposition of the properties during litigation, as is provided by 18 U.S.C. §§ 1955(d) and 1963(b)(1976). On this appeal, Godoy concedes that each of these parcels was acquired with the proceeds of his racketeering activity.

On November 19, 1979, Godoy was convicted by a jury on all counts charged in the indictment. The jury also returned a special verdict forfeiting the six properties. Nonetheless, the district court's judgment order forfeited only the last four properties listed above. The court indicated that it would not forfeit the market and pharmacy

because Mrs. Godoy had recently given birth to the couple's first child, and it felt that some source of support for the family should be preserved. Godoy immediately bought his appeal; the Government seems initially to have been satisfied with the forfeiture order and did not cross appeal.

Six months later, in June of 1980, Godoy petitioned the district court to remove the restraining order on the properties that had not been forfeited. The Government responded with a motion to correct the forfeiture order pursuant to Fed.R.Crim.P. 35(a). Relying on recent Fifth Circuit authority, *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980), the Government sought to amend the forfeiture order to include the market and pharmacy. The district court denied the motion and the Government timely appealed that denial.[1]

The Government does not challenge the district court's decision against forfeiture of the Ventura property and concedes that the residential property is not subject to forfeiture under our holding in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980). Godoy does not challenge the order insofar as it forfeits the Whiskey Creek Nightclub. No question concerning these three properties is before this court.

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[1]We heard argument on Godoy's appeal (No. 79-1788) on September 19, 1980, but deferred submission pending outcome of the appeal in *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed. 2d 972 (1981). Thereafter, the Government brought its appeal (No. 80-1600). We ordered it consolidated with Godoy's appeal and heard argument on March 24, 1981. The two appeals were submitted that same day.

I.

GODOY'S APPEAL.

A. The Validity of the Indictment.

Godoy seeks reversal of his conviction on the sole ground that his indictment was void. Of the seventeen grand jurors voting the indictment, only ten had attended all the evidentiary sessions. Godoy contends that the remaining seven were not "legally qualified" to vote the return of the indictment because they were not fully informed. He concludes that his indictment was not returned "upon the concurrence of 12 or more jurors," as required by Fed.R.Crim.P. 6(f), and that it was therefore void.

[1] Godoy relied on the short-lived decision of the district court in *United States v. Leverage Funding Systems, Inc.*, 637 F.2d 645 (9th Cir.), *rev'g* 478 F.Supp. 799 (C.D. Cal. 1979), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1980). There, we stated:

> Under the Fifth Amendment and Fed.R.Crim.P. 6(a) and 6(f), an indictment is valid if (1) the grand jury returning the indictment consisted of between 16 and 23 jurors, (2) every grand jury session was attended by at least 16 jurors, and (3) at least 12 jurors vote to indict. Nothing requires that every juror voting to indict attend every session.

Id. at 649. Godoy's indictment satisfied these criteria in all respects and was therefore valid. The conviction is affirmed.

B. The Forfeiture.

Godoy challenges the forfeiture of the Van Nuys and Mission Hills properties he owns. The Van Nuys property includes a building leased to two different businesses: one

a camera shop, the other a pharmacy. The Mission Hills property is a corner lot and building leased to six different businesses, including a liquor store, a television repair shop, and a small market.

[2] RICO requires forfeiture of "any interest in . . . any enterprise" acquired through the investment of "income derived . . . from a pattern of racketeering activity." 18 U.S.C. §§ 1962(a), 1963(a).[2] The only issue is whether Godoy's ownership of the two pieces of commercial real estate constitutes an "interest in any enterprise."[3] We hold that it does.

We must examine congressional intent in order to determine the scope of the term enterprise. Both the language and the legislative history of RICO suggest that Congress intended "interest in any enterprise" to include ownership of income-producing commercial real estate. As a start, Congress defined enterprise broadly, including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.

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[2]It s a violation of § 1962 to invest the gains of racketeering activity in legitimate businesses ("It shall be unlawful for any person who has received any income . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in . . . any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a) (1976)). Section 1963(a) requires forfeiture of any interest acquired in violation of § 1962 ("Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962,. . . ." 18 U.S.C. § 1963(a) (1976)). *See Marubeni*, 611 F.2d at 769.

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[3]It is undisputed that Godoy used racketeering income to acquire the properties, and that the tenants are engaged in interstate commerce. *See supra* note 2.

§ 1961(4) (1976). In addition, Congress included a liberal construction clause in the Act. 18 U.S.C. § 1961 note (1976) ("The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes.")

Furthermore, Congress was aware that organized crime had invested extensively in real estate. In its report, the Senate Committee on the Judiciary listed "real estate" among the many industries invaded by organized crime. S.Rep.No. 617, 91st Cong., 1st Sess. 76-77 (1969). That report also referred to an earlier Senate report which noted organized crime ownership of large amounts of real estate, including commercial rental property. *Id* at 77; S.Rep.No. 307, 82d Cong., 1st Sess. 34 (1951) (Report of the Special Committee to Investigate Organized Crime in Interstate Commerce). Given this awareness, if Congress did not wish the RICO forfeiture provisions to apply to ownership of commercial real estate, we would expect specific statutory exclusion of this type of investment.[4]

Godoy's only argument rests on our decision in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980). There the Government sought forfeiture of the *uninvested* gains from the defendant's racketeering. We denied the request because such proceeds have to be invested in an enterprise before they can be forfeited. *Id.* at 767. Thus, we had no occasion to interpret the meaning of "interests in any enterprise," the issue now before us.

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[4]Congress did specifically exclude another type of investment that appeared to be investment in an enterprise. *See* 18 U.S.C. § 1962(a) (197) (excluding from forfeiture purchase on the open market of less than one percent of securities issued by a publicly held corporation).

We conclude that the district court correctly ordered the forfeiture of Godoy's interests in the Van Nuys and Mission Hills properties.[5]

II.

THE GOVERNMENT'S APPEAL.

The Government appeals the district court's denial of its Rule 35 motion to correct the forfeiture order as an illegal sentence. Godoy challenges this court's jurisdiction to entertain the appeal.

[3] The Government asserts jurisdiction under 18 U.S.C. § 3731 (1976). By enacting that statute, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642, 649 (1977); *United States v. Hetrick*, 644 F.2d 752, 755 (9th Cir. 1981). In *Hetrick*, this court held that the Government may appeal, pursuant to § 3731, a district court order granting a Rule 35 motion for reduction of sentence. We see no reason to treat differently an order on a Rule 35 motion for correction of an illegal sentence. Although the Government in this case seeks to impose on Godoy a more onerous condition than that originally imposed by the district court, reversal of the district court's order would simply have the effect of reinstating the jury's special verdict. Hence, the double jeopardy

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[5] The dissenting opinion labels this result an anomaly because "all income except that which is kept in a mattress would be forfeitable." *Post*, slip op. at 2154, at _____, (Poole, J., dissenting). We disagree with this characterization but, in any event, it is for Congress, not the courts, to repair a confused statutory scheme.

clause would not be offended. *See United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). We hold that this court has jurisdiction to review the district court's order.[6]

The Government contends that the district court's forfeiture order was an illegal sentence because it did not include the market property; and that the jury's special verdict of forfeiture obliged the court to forfeit that property. Thus, the Government urges this court to adopt the position taken by the Fifth Circuit in *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S.Ct. 104, 66 L.Ed.2d 39 (1980).

[4] In *L'Hoste*, the defendant was convicted under RICO and the Government sought forfeiture of his interest in R.J. L'Hoste & Company. As in this case, the district court declined to order forfeiture out of concern for the interests of the defendant's wife. After exhaustive analysis, which we need not duplicate here, the Fifth Circuit held that the forfeiture provisions of § 1963(a) are mandatory, leaving no discretion in the district court. We find the reasoning of the Fifth Circuit compelling and adopt it as our own. 609 F.2d 809-13. Upon the jury's determination that Godoy had violated § 1962, and that his interest in the market had been acquired or maintained in violation of that section, the forfeiture provisions of § 1963(a) were triggered and the district court was obliged to order forfeiture of the market.

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[6] Godoy asserts that the Government's appeal is not timely because its appropriate appeal was from the forfeiture order. However, neither Fed.R.App.P. 4(b) nor any other authority of which we are aware precludes a party from appealing a final order on a postjudgment motion merely because that party has not appealed the initial judgment. In addition, we not that Fed.R.Crim.P. 35 permits a motion to correct an illegal sentence at any time. Hence, late as it was, the Government's post judgment motion was timely.

[5] In response to the Government's Rule 35 motion, the district court asserted that it would be justified in setting aside the jury's special verdict of forfeiture. We need not address the merits of this position because examination of the record indicates that no such action was ever taken. Moreover, at the time that the court considered setting aside the jury verdict, such an action would have been untimely under Fed.R.Crim.P. 29(c). That rule allows the court to enter judgment of acquittal upon a motion made within seven days of the verdict. The court here would have been acting more than eight months after the verdict. Nothing had been done during that time by either the parties or the court to preserve the matter for such late action. Plainly, Rule 29(c) prevented entry in August of an order setting aside the jury verdict.

It therefore appears that the district court was without power to decline to order forfeiture of the market. Insofar as it failed to order such forfeiture, the district court's judgment was an illegal sentence and should have been corrected upon the Government's motion. We therefore reverse the court's denial of the Rule 35 motion.

Godoy's conviction is affirmed. The case is remanded for actions consistent with this opinion and for such further action as may be necessary under § 1963(b) and (c).

POOLE, Circuit Judge, concurring and dissenting:

I concur in parts IA and II of the majority opinion, but not in part IB, because I conclude that the majority's holding affirming the forfeiture of Godoy's commercial property at Van Nuys and Mission Hills is inconsistent with this court's opinion in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980).

In *Marubeni*, we held that Congress did not intend to provide for forfeiture of all income from racketeering activities when it enacted RICO. Rather, Congress' forfeiture scheme is as follows:

> [T]he § 1963(a)(1) forfeiture provision applies to interests "in an enterprise" illegally acquired or maintained. Section 1963(a)(2) completes the attack on racketeering infiltration by insuring that persons who conduct an enterprise illegally will similarly be separated from it, even if the enterprise was legally acquired and maintained.

Id at 769. Thus, the fact that Godoy acquired property with income from racketeering activity did not by itself warrant forfeiture of that property. Godoy's property interests were not properly forfeited unless they could fairly be characterized as interests in an "enterprise."

At least some of these properties housed active businesses. However, the majority does not suggest that those tenants are involved with Godoy in a RICO "enterprise" since Godoy was not associated with them in any way. Neither does the opinion imply that Godoy's property interests afforded him a "source of influence over" the tenant businesses. *See* 18 U.S.C. § 1963(a)(2). It is quite clear that Godoy had no relationship with any of the businesses conducted on his properties other than that of landlord, and that that relationship afforded him no influence over them.

Instead, the majority concludes that the enterprise here is simply the aggregate of Godoy's investment activities. In particular, it finds that since Godoy took income derived from racketeering activity and invested it in the purchase of real property, the users (lessees) of which paid him income (rent), he is engaged in the "enterprise" of real estate investment, in violation of § 1962(a), and that the property he acquired is therefore subject to forfeiture under § 1962(a)(1) as an "interest . . . acquired or maintained in violation of section 1962."

Yet the majority's position that mere purchase of real estate using racketeering income constitutes an enterprise effectively nullifies the holding of *Marubeni*. It creates the anomaly that while income from racketeering activity would not itself be subject to forfeiture, any assets or income traceable to that income would be so subject. In effect, all income except that which is kept in a mattress would be forfeitable.

The majority opinion is also inconsistent with other explicit provisions of RICO itself. For example, § 1962(a) specifically states:

> A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or fact, the power to elect one or more directors of the issuer.

In *Marubeni*, we stated:

> Congress would not have established rules for the investment of racketeering income, enforced by the penalty of criminal forfeiture, if it intended the government to seize that income regardless of how it was used.

611 F.2d at 767. Likewise, Congress would not have established rules for the investment of racketeering income if it intended by use of the term "enterprise" to comprehend

that very activity and thereby to subject to forfeiture the investments made. This was not mere solicitude for the stock market; it was recognition that invested income may generate profit without creating an "enterprise," especially where the investor has no input into the conduct or management of the business.[1]

This is not to suggest that the activity of investment in real estate may never constitute an enterprise within the meaning of RICO. An owner or lessor may have such a relationship to the business carried on as to assume the character of an ongoing business concern. However, the evidence presented in this case shows nothing more than an ordinary at arm's length lessor-lessee relationship and as such was insufficient to support a finding that Godoy was such an investor. Nor did Godoy's ownership constitute part of an ongoing real estate development scheme. Thus the dangers identified by Congress—use of coercive tactics and corruption of local officials to gain an unfair competitive advantage[2]—are largely inapplicable to this type of passive investment.

Indeed, Godoy's involvement with the commercial property is not unlike his position vis-a-vis the residential property which he also owned and rented and which the

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[1]It seems apparent that the stock investment exception was intended to provide clear guidelines for investments in what are concededly enterprises, rather than, as the majority suggests representing the exclusive means of investing racketeering income. Nothing in the legislative history indicates a Congressional motivation thus to funnel racketeering acquired funds into the stock market.

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[2]*See Organized Crime Control: Hearings Before Subcommittee No. 5 of the House Committee of the Judiciary*, 91st Cong., 2d Sess. 89 (1970) (statement of Senator McClellan); *Id.* at 433 (statement of Aaron M. Kohn, United States Chamber of Commerce); S.Rep.No. 91-617, 91st Cong., 1st Sess. 77 (1969).

government conceded was not an enterprise under *Marubeni*. The residential property constituted "income-producing real estate" under the majority's definition of an "enterprise." And although it was not "commercial real estate" Godoy had no interest in the businesses operating on his property other than the collection of rent. Thus, since the focus here is on whether Godoy's ownership of the *property* constituted an enterprise, he occupied the same position for both the commercial and residential real estate.

Accordingly, I would reverse the order insofar as it forfeits Godoy's commercial properties in Van Nuys and Mission Hills.

FILED
JUL 28 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RALPH GODOY, aka RICHARD G. WOOD, Defendant-Appellant.	No. 79-1788 No. 80-1600 D.C. Nos. 79-660(A)-WPG and 79-660-WPG ORDER

Appeal from the United States District Court
for the Central District of California
Honorable William P. Gray, District Judge, Presiding

Before: POOLE, NELSON, and NORRIS, Circuit Judges.

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a hearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on September 24, 1982, I served the within *Petition for A Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Hand delivered; forty copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
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San Francisco, California 94101

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Washington, D. C. 20530

Solicitor General
Department of Justice
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(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 24, 1982 at Santa Monica, California.

KIRK W. HARNEY
(Original signed)